No. 20155

United States
COURT OF APPEALS
for the Ninth Circuit

EDITH L. HIGLEY, Widow of Darold B. Higley, Deceased,

Appellant,

v.

J. J. O'LEARY, Deputy Commissioner, Fourteenth Compensation District, W. J. JONES & SON, INC., and NATIONAL AUTOMOBILE & CASUALTY INSURANCE CO.,

Appellees.

Appeal from the United States District Court for the District of Oregon

BRIEF OF APPELLEES W. J. JONES & SON AND NATIONAL AUTOMOBILE AND CASUALTY INSURANCE CO.

KRAUSE, LINDSAY & NAHSTOLL,
W. H. POOLE,
Ninth Floor Loyalty Building,
Portland, Oregon 97204,
Proctors for Appellees W. J. Jones & Son and National Automobile and Casualty Insurance Co.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 8-65

SUBJECT INDEX

TABLE OF AUTHORITIES

No. 20155

United States
COURT OF APPEALS
for the Ninth Circuit

EDITH L. HIGLEY, Widow of Darold B. Higley, Deceased,

Appellant,

v.

J. J. O'LEARY, Deputy Commissioner, Fourteenth Compensation District, W. J. JONES & SON, INC., and NATIONAL AUTOMOBILE & CASUALTY INSURANCE CO.,

Appellees.

Appeal from the United States District Court for the District of Oregon

BRIEF OF APPELLEES W. J. JONES & SON AND NATIONAL AUTOMOBILE AND CASUALTY INSURANCE CO.

JURISDICTION

Appellees W. J. Jones & Son, Inc. and National Automobile & Casualty Insurance Co. agree that this Court has jurisdiction by reason of the facts and statutes set forth in appellant's brief.

STATEMENT OF THE CASE

We are not disposed to quarrel with appellant's manner of stating the case, recognizing the need to place one's best foot forward, but must call attention to the omission of these significant facts:

(a) The pathologist, Dr. Buck, made microscopic tissue slide studies of the deceased's heart muscle and arteries as part of the autopsy. He found myocardial infarcations which prove death of the tissue a substantial time before the man expired (R. 43-48).

(b) While the deceased's wife claimed that the health of the deceased appeared to be good, she also admitted that during the year prior to his death he had fainted, had blurred vision, had suffered from headaches, had shortness of breath, and had been involved in an argument with her before leaving for work on the day of his death (R. 25-27, 30).

(c) There was competent medical opinion testimony which fully supports a finding that the death did not result from an accidental injury arising out of and in the course of this man's employment (R. 58-60, 67-68).

(d) The specific basis for rejection of the claim after a full hearing of the evidence was that:

> "The death of the deceased was due to advanced coronary disease and was in no way related to the work in which he was engaged

at the time of his collapse and death on December 16, 1963." Deputy Commissioner's Compensation Order (R. 6).

ARGUMENT

A. Introductory Statement

Claimant concedes, as she must, that the findings of a Deputy Commissioner are presumed to be correct:

> "* * *(T)he findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole." *O'Leary* v. *Brown-Pacific-Maxon, Inc.,* 340 U.S. 504, 508, 71 S. Ct. 470, 95 L. Ed. 483 (1951).

The test is clearly stated in *Cardillo* v. *Liberty Mutual Insurance Co.,* 330 U.S. 469, 67 S. Ct. 801, 91 L. Ed. 1028 (1947):

> "If supported by evidence and not inconsistent with the law, the Deputy Commissioner's inference that an injury did or did not arise out of and in the course of employment is conclusive. No reviewing court can then set aside that inference because the opposite one is thought to be more reasonable; nor can the opposite inference be substituted by the court because of a belief that the one chosen by the Deputy Commissioner is factually questionable." (330 U.S. at p. 477-478).

Hence, the only question presented and to be decided upon this appeal is whether there is substantial evidence in the record which supports the finding of Deputy Commissioner O'Leary

"* * * that the work in which the deceased had been engaged prior to his collapse and death did not contribute in any way to his death and the deceased did not sustain an accidental injury arising out of and in the course of his employment * * * and it (the claim) is hereby REJECTED for the following reason: The death of the deceased was due to advanced coronary disease and was in no way related to the work in which he was engaged at the time of his collapse and death on December 16, 1963." (R. 6).

B. Question Before Deputy Commissioner and District Court

Since there was competent evidence presented on both sides, the question presented to the Deputy Commissioner was whether the employee's heart condition and his death therefrom was the result of accidental injury "arising out of and in the course of employment", 33 U.S.C.A. § 902(2),(11). This question must be determined by the Deputy Commissioner on the basis of all of the evidence before him. *Liberty Mut. Insur. Co.* v. *Gray,* 9th Cir., 137 F.2d 926 (1943); *Gooding* v. *Willard,* 2d Cir., 209 F.2d 913 (1954); *Eschbach* v. *Contractors, Pacific Naval Air Bases,* 7th Cir., 181 F.2d 860 (1950).

The Deputy Commissioner as trier of the facts, is entitled to resolve conflicts either way upon the basis of the testimony and evidence adduced at the hearing. He must also determine the credibility of witnesses, including medical witnesses. *National Labor Relations Board* v. *Walton Mfg. Co.,* 369 U.S. 404, 7 L. Ed. 2d 829, 82 S. Ct. 853 (1962); *John W. McGrath Corp.* v. *Hughes,* 2d Cir., 289 F.2d 403 (1961); *Todd Shipyards Corp.* v. *Donovan,*

5th Cir., 300 F.2d 741 (1962). Upon judicial review his determination should be accepted unless clearly erroneous. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456 (1951); *Morrison-Knudsen Co.* v. *O'Leary,* 9th Cir., 288 F.2d 542, 544 (1961).

In this case, an experienced pathologist who performed the autopsy testified that the workman

> "* * * died as a direct result of the disease of his coronary arteries and the acute occlusion of the descending branch of the left coronary artery." (R. 43).

He further noted that the disease

> "* * * was all superimposed on an advanced atherosclerosis of his (Higley's) coronary arteries which was quite marked." (R. 43-44).

The pathologist estimated that the occlusion in the descending branch of the left artery had occurred some 4 to 12 hours before the time the man actually expired, and the occlusion or thrombosis of the right coronary artery had been present for between one to four weeks before his death (R. 43-44, 46-47). Furthermore, the left anterior descending coronary artery was 80 to 90 per cent blocked by deposits of fatty substances which thickened the lining of the artery and were wholly attributed to the natural disease process unrelated to the man's employment (R. 47).

Dr. Kenneth C. Wilhelmi, a specialist in internal medicine equally competent with appellant's expert, testified as follows:

"I would feel the cause of his death was a final ultimate occlusion in the anterior descending branch of the left coronary artery superimposed upon previous occlusive disease of the right coronary artery as well as partial previous occlusion of the anterior descending branch." (R. 59).

* * * * *

"* * * this man's death was due to this additive occlusion of the left anterior descending branch of the left coronary artery, and I do not feel that the physical effort per se, we have no evidence or information that makes us believe that it was related to the occurrence of the occlusion." (R. 60).

Upon extensive examination and cross examination the doctor fully explained the basis for his opinion that the death was not connected with the employment and was the result of the latest occlusion or thrombosis that he and the pathologist both agreed occurred a substantial time prior to the actual death (R. 60-70).

C. No Presumption That Claim Compensable

Appellant states at page 12 of her brief

"The applicable law which he (the Deputy Commissioner) administers presumes the claim to be compensable 'in the absence of substantial evidence to the contrary.' 33 U.S.C.A. § 920 (a);"

While this is a correct interpretation of the law when a claim has been allowed, *General Accident Fire & Life Assurance Corporation* v. *Donovan,* D.C. Cir., 251 F.2d 915 (1958), or when there has been an entire lack of competent evidence; the presumption no long-

er exists where competent evidence has been introduced on the question of lack of causal connection between the accident and death. See, *Liberty Mutual Insurance* Co. v. *Gray,* 9th Cir., 137 F.2d 926, 928 (1943).[1]

As stated in *Nardi* v. *Willard,* S.D. N.Y., 156 F. Supp. 425, 429 (1957):

> "The presumption in favor of the claimant contained in Section 920 of the Longshoremen's and Harbor Workers' Compensation Act has not 'the attribute of evidence in the claimant's favor.' 'Its only office is to control the result where there is an entire lack of competent evidence.' Del Vecchio v. Bowers, 296 U.S. 280, 286, 56 S. Ct. 190, 193, 80 L. Ed. 229. Where competent evidence has been introduced by the carrier on the question of lack of causal connection between the accident and the death, presumption (sic) drops out and the question must be determined by the Deputy Commissioner on the basis of all the evidence before him."

D. Strenuousness of Work Not Basis of Rejection

Claimant bases her principal claim of error upon a statement of the Deputy Commissioner that the work in which decedent was engaged was similar to and no more strenuous than the type of work in which he was customarily engaged.

Curiously, appellant in the same breath admits that such a finding is irrelevant, with which we entirely

---

[1] On the contrary, the presumption is rather that the Deputy Commissioner's findings of fact are correct where challenged in a judicial proceeding seeking to upset the same. *Burley Welding Works, Inc.* v. *Lawson,* 5th Cir., 141 F.2d 964 (1944); *Pan American Airways* v. *Willard,* S. D. N. Y., 99 F. Supp. 257 (1951).

agree. Whether the work in which decedent was engaged at the time of his death was more strenuous or less strenuous than the type of work in which he was customarily engaged has no bearing in this case.

To be error, and therefore appealable, the statement referred to would have to be the basis of denial of compensation. There is no indication whatsoever that Deputy Commissioner O'Leary rejected the claim on the basis that the claimant was engaged in a more strenuous type of work than that in which he was customarily engaged. In fact, one does not have to engage in surmise, as appellant would have this court do, but need only look to the succinct statement of the Deputy Commissioner for rejecting the claim:

> "The death of the deceased was due to advanced coronary disease and was in no way related to the work in which he was engaged at the time of his collapse and death on December 16, 1963." (R. 6).

Appellant's quotation from A. P. Herbert should not be dignified with an answer. Suffice it to say that every phrase in a judicial opinion should not be subject to withdrawal from context for hypercritical scrutiny in a strained effort to "suggest(s) the application * * * of an erroneous legal standard" (App. Br. 9) by the Court or hearing officer below. As the Court of Appeals for the Second Circuit has said:

> "The finding of no causal connection went unnecessarily far in positive terms, but whether or not it went unjustifiably far on the evidence it was at least an expression of the determination of the Commissioner that the evidence was short to show

affirmatively a causal connection between the accident and the death. It is abundantly clear that the evidence on the subject was so conflicting that the Commissioner could reasonably have found that there was no preponderance in favor of the appellee (widow) * * * no more was needed to support his decision * * *." *Gooding* v. *Willard,* 2d Cir., 209 F.2d 913, 916 (1954).

Claimant also makes the assumption that the only heavy manual labor which the deceased had done during his lifetime was that which he was doing at the time of his death. This is another assumption which cannot be drawn from the record. Grading work and the operation of a logging crane (R. 28, 29) can obviously be extremely arduous and physically as exerting as moving timber on rollers (R. 34).

What the record does indicate, without significant contradiction, is that the death resulted from heart disease wherein the right coronary artery had been blocked or occluded due to natural disease processes some time during the previous month, and the left descending artery, almost entirely closed by fatty deposits, sustained a similar occlusion some four to twelve hours before death occurred. These facts were developed by Dr. Charles E. Buck during the autopsy, by taking slides of various parts of the organ and microscopically examining the same. The slides clearly showed infarctive changes in the heart muscle, indicating death of the tissue a substantial number of hours beforehand as a result of the left descending artery occlusion which had occurred earlier in the day or sometime during the night before (R. 43-48).

The pathologist's opinion was confirmed by Doctor Wilhelmi, who was of the opinion that the decedent died as a result of the two occlusions superimposed upon the "extensive atherosclerotic disease in all of the coronary arteries, the aorta as well" as found by Doctor Buck (R. 59-60). While he agreed that a judicious practitioner would not have advised a man with known heart occlusion to engage in heavy labor, he also pointed out that each case is individualized, that where a man has been regularly working it is equally dangerous to put him on sedentary activity, and that numerous studies have revealed that death from myocardial infarctions and coronary artery occlusions can just as often occur at any time or place and will very frequently occur when a person is at complete rest or asleep (R. 64, 70). The doctor testified that, in his opinion, there was no causal connection between Higley's employment and his death (R. 58-60, 67-68).

Upon the foregoing evidence the Deputy Commissioner concluded:

> "That the immediate cause of death was an acute anterior myocardial infarction due to advanced atherosclerosis of the coronary arteries and acute thrombosis of the left coronary artery; that the work in which the deceased had been engaged prior to his collapse and death did not contribute in any way to his death and the deceased did not sustain an accidental injury arising out of and in the course of his employment by the employer above named." (R. 6).

The only testimony to the contrary is that of Doctor Murphy, the claimant's internist, who based his entire

opinion on the premise that the occlusion causing death occurred approximately at the same time as death (R. 54), and, therefore, that the clinical and pathological findings made by Doctor Buck, the pathologist, were erroneous (R. 53-55). At the same time Doctor Murphy admitted that if there were such findings, as reported by the pathologist upon autopsy (R. 55), they would indicate that the occlusion occurred some time prior to death (R. 54, 55). He was in effect stating his opinion that the myocardial infarctions which the autopsy revealed, did not exist or at least that he would draw a different conclusion from them (R. 53, 58).

This speculative rejection of the positive findings by tissue slides taken in the course of the autopsy by Doctor Buck (which Doctor Murphy had never seen) could hardly be said to sustain the burden upon appellee to show causal connection.

Certainly it cannot be said that the District Court was unwarranted in concluding, from the record as a whole, that claimant had failed to sustain the burden resting upon her to establish her claims as found by the Deputy Commissioner.[2]

---

[2] Compare the very similar case of *Granholm* v. *Cardillo,* D.C. Cir., 116 F.2d 948 (1940).

CONCLUSION

The record clearly indicates that when the correct tests are applied to the facts which were before the Deputy Commissioner and the District Court, the findings and the basis of the rejection of the claim are accurate and are supported by substantial evidence.

As Judge Denman of this court pointed out over 20 years ago in deciding a case under the Longshoremen's and Harbor Worker's Compensation Act, it is not the function of a reviewing court

> "* * * (T)o weigh the evidence to make its choice of * * * two possible inferences from the testimony. This was the function of the Deputy Commissioner." *Liberty Mutual Insurance Co.* v. *Gray, supra,* 137 F.2d at p. 928.

The judgment of the court below should be affirmed.

Respectfully submitted,

KRAUSE, LINDSAY & NAHSTOLL,
WILLIAM H. POOLE,
Proctors for Appellees
W. J. Jones & Son, Inc. and
National Automobile and
Casualty Insurance Company

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WM. H. POOLE, Attorney